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In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. 998

MILKY WAY PRODUCTIONS, INC., JAMES BUCKLEY and AL GOLDSTEIN,

Appellants,

against

HOWARD R. LEARY, individually and as Police Commissioner of the City of New York, and FRANK S. HOGAN, individually and as District Attorney of the County of New York,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT OF APPELLANTS MILKY WAY PRODUCTIONS INC., *ET AL.*

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INDEX

PAGE

Opinion Below 1

Grounds on Which Jurisdiction Is Invoked 2

Questions Presented 3

Statement of the Case 4

1. When and How Federal Questions Were Raised and Decided 4

2. The Undisputed Facts and Rulings of Law .. 4

Substantiality of Federal Questions

I. Penal Law Section 235.00(1) is overbroad for failing to delimit pandering and foisting on an unwilling public 14

II. The procedural statutes (C.P. 148-150) are unconstitutional as applied in law to borderline publications 15

A. The procedural arrest warrant statutes as applied as a matter of law operate in substance as unconstitutional prior restraint and suppression of borderline publications under any view of the law 17

1. Where Procedural Statutes Can Destroy a Borderline Publication Before Ultimate Adversary Determination of Obscenity, and the So-Called Procedural Safeguards of Defending Multiple Prosecutions Are No Safeguards at All on Appellees' Own View of the Law, the Statutes as Applied Are *Per Se* Unconstitutional 17

PAGE

2. The Arrest Warrant Statutes (C.C.P. Sec. 148-150) as Applied as a Matter of Law Are Overbroad Statutes Controlling and Sweeping Within Their Reach Both the Usual Criminal Contraband and Borderline Publications Which Are Not Contraband 19

3. The Statute (C.C.P. 148-150) as Applied as a Matter of Law Permitting Arrests on "Probable Cause" to Believe a Borderline Publication Obscene Is Unduly Vague 22

4. Bad Faith Is Immaterial; the Arrest Warrant Statutes as Applied in Law Afford "Safeguards" Only to Major Corporations or Purveyors of Hard-Core Pornography, But Not to Small Publishers Who Wish to Comply With the Law 23

B. Suppressions of borderline publications stemming from the application in law of the arrest warrant statutes are totally without justification where alternative methods will avoid suppression, enable publishers to comply with the law and enable law enforcement officials to effectively enforce the law 27

Appendix A—Opinion Three-Judge District Court Southern District of New York 1a

Appendix B—New York Penal Law Section 235.00(1) New York Code of Criminal Procedure Sections 148-150 ..... 24a

Appendix C—List of Arrests Affecting the Publication Scene 28a

TABLE OF CASES

PAGE

A Quantity of Books v. Kansas, 378 U. S. 205 (1964) 13, 17, 20

Baggett v. Bullitt, 377 U. S. 360 (1964) 2, 22

Bantam Books, Inc. v. Sullivan, 372 U. S. 58 (1963) 5, 26, 27

Breard v. Alexandria, 341 U. S. 622 (1951) 15

Bunis v. Conway, 17 App. Div. 2d 207, 234 N.Y.S. 2d 435, 4th Dept. 1962 27

Combist Films Inc. v. Illinois, 292 F. Supp. 180 (N.D. Ill. 1968) 13

Cameron v. Johnson, 390 U. S. 611 (1968) 2, 8, 23

Delta Book Distributors, Inc. v. Cronvich, 304 F. Supp. 662 (E. D. La. 1969) 15

Dombrowski v. Pfister, 380 U. S. 479 (1965) 3

Florida Lime Growers v. Jacobsen, 362 U. S. 73 (1960) 3

Freedman v. Maryland, 380 U. S. 51 (1965) 17

Ginsburg v. United States, 383 U. S. 463 (1966) 12, 30

Goldstein v. Cox, 389 U. S. 581 (1968), judgment vacated and remanded to 2d Circuit, 391 F. 2d 586 (2d Cir. 1968), decision on remand from Supreme Court 2, 8,

Grant v. United States, 380 F. 2d 748 (9th Cir. 1967) 14

Karalexis v. Byrne, No. CA69-663-J, D. Mass., Nov. 28, 1969 14

Keyishian v. Board of Regents, 385 U. S. 589 (1967) 2

PAGE

Kingsley Books Inc. v. Brown, 354 U. S. 436 (1957) .. 16

Lee Art Theatre, Inc. v. Virginia, 392 U. S. 636 (1968) 17

Marcus v. Search Warrant, 367 U. S. 717 (1961) ..8, 18, 20

Meinoirs v. Massachusetts, 383 U. S. 413 (1966) 12, 20

Metzger v. Pearcy, 393 F. 2d 202 (7th Cir. 1968) 20

Morrison v. Wilson, PCA 2110, N. D. Fla., Sept. 26, 1969 16

People v. Billingsley, No. 5544-46, Mich. Ct. App., Oct. 30, 1969 14

People v. Carlos, 24 N. Y. 2d 865, 301 N.Y.S. 2d 96 (1969) 15, 22

People v. Richard Cohen, No. B19991/1968, Crim. Ct. N. Y. Co., Sept. 17, 1968 18

People v. Kozak, 56 Misc. 2d 337, 288 N.Y.S. 2d 692 (Crim. Ct. N. Y. Co. 1968) 8, 18, 20

People v. Rothenberg, 20 N. Y. 2d 35, 281 N.Y.S. 2d 316 (1967) 8, 18, 20

People v. Stabile, 58 Misc. 2d 905, 296 N.Y.S. 2d 815 (Crim. Ct. N. Y. Co. 1969) 10, 12, 20, 22

People v. Weingarten, 50 Misc. 2d 635, 271 N.Y.S. 2d 158 (Crim. Ct. N. Y. Co. 1966); affirmed 55 Misc. 2d 681, 286 N.Y.S. 2d 429 (App. Tm. 1st Dept. 1967); *reversed* Court of Appeals, N.Y.L.J. *Nov. 3, 1969,* p. 2, col. 2 22

People v. White, 56 Misc. 2d 900, 290 N.Y.S. 2d 253 (Crim. Ct. N. Y. Co. 1968) 8, 12, 18, 20

Poulos v. Rucker, 288 F. Supp. 305 (M. D. Ala. 1968) 14, 28

PAGE

Public Utilities Commission v. Pollak, 343 U. S. 451 (1952) 15

Rage Books Inc. v. Leary, 301 F. Supp. 546 (S.D.N.Y. 1969) 12, 26, 29

Redrup v. New York, 386 U. S. 767 (1967) 7, 14, 15

Rogerin Associates, Inc. v. Hogan, 8790/1964, Sup. Ct. N. Y. Co. 1964 27

Roth v. United States, 354 U. S. 476 (1957) 13, 15, 29

Smith v. California, 361 U. S. 147 (1959) 4, 8, 18, 19

Sokolic v. Ryan, 304 F. Supp. 213 (S. D. Ga. 1969) .. 16

Stanley v. Georgia, 394 U. S. 557 (1969) 7, 14, 15, 20

Stein v. Batchelor, 300 F. Supp. 602 (N. D. Tex. 1969) 14

Tyrone, Inc. v. Wilkinson, 410 F. 2d 639 (4th Cir. 1969) 28, 30

United States v. 4,400 Copies of Magazines, 276 F. Supp. 902 (D. Md. 1967) 14

United States v. 127,295 Copies of Magazines, 295 F. Supp. 1186 (D. Md. 1968) 14

Zschernig v. Miller, 389 U. S. 429 (1968) 2, 8

Zwickler v. Koota, 389 U. S. 241 (1967) 2, 8, 20, 23, 24

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, First Amendment .....

New York Penal Law Section 235.00(1) 2, 3, 4, 6, 14

New York Code of Criminal Procedure Sections 148-150 ..... 2, 3, 7, 8, 15, 19, 20, 22

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT OF APPELLANTS MILKY WAY PRODUCTIONS INC., *ET AL.*

Opinion Below

The opinion of the United States District Court for the Southern District of New York, three-judge district court, has not been reported and is set forth in Appendix A.

Grounds on Which Jurisdiction Is Invoked

(i) Appellants, Milky Way Productions, Inc., its executive editor, Al Goldstein, and co-publisher, James Buckley, (hereafter generally appellants or appellant Milky Way), instituted this action for declaratory judgment and for interlocutory and permanent injunction under 28 U.S.C. 2201, 42 U.S.C. 1983, 28 U.S.C. 1483, and 28 U.S.C. 2281 and 2284: (a) under Count II of the complaint to declare unconstitutional the New York Obscenity Statute, Penal Law 235.00(1), on the ground that it is an overbroad regulation of First Amendment rights failing to mandate pandering or foisting on an unwilling public and (b) under Counts I and IV of the complaint to declare unconstitutional facially and as applied as a matter of law to borderline publications the New York Arrest Warrant Statutes, Code of Criminal Procedure Sections 148 through 150.

(ii) Appellants seek a review of the ruling and order of the three-judge district court denying appellants' motion for an interlocutory injunction and holding constitutional facially and as applied as a matter of law Penal Law Section 235.00(1) and Code of Criminal Procedure Sections 148 through 150, decided and filed October 15, 1969. Notice of appeal was filed by appellant Milky Way on October 30, 1969, District Court, Southern District New York.

(iii) Jurisdiction of the appeal is conferred on this Court by Title 28 United States Code Section 1253.

(iv) Cases believed to sustain jurisdiction: *Zwickler* v. *Koota*, 389 U. S. 241 (1967); *Cameron* v. *Johnson*, 390 U. S. 611, 615-617 (1968); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Goldstein* v. *Cox*, 389 U. S. 581 (1968); *Zschernig*

v. *Miller*, 389 U. S. 429 (1968); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73 (1960).

(v) The validity of Penal Law Section 235.00(1) and the validity of New York Code of Criminal Procedure Sections 148 through 150 facially and as applied as a matter of law are challenged. They are set forth in Appendix B.

Questions Presented

1. Is Penal Law Section 235.00(1) unconstitutional where it fails to mandate or confine its application as statutory tests to pandering and foisting on an unwilling public in either the hard-core or borderline (close case) area?

2. Where the procedural statutes (C.C.P. 148-150) as applied as a matter of law to borderline publications permit repeated arrests of publishers based only upon *ex parte* judicial ruling of the obscenity of a particular borderline publication issue, and permit the arrests of newsdealers for selling such issue without any warrant for their arrest, and (i) immediately upon the issuance of the warrant stop the public sales of the publication issue, which is the subject of the *ex parte* judicial ruling, and (ii) immediately stop and suppress the sale of subsequent publication issues, which are not the subject of any ruling of obscenity, *ex parte* or otherwise, and (iii) can totally destroy the publication itself, all while defenses are being asserted in the Criminal Court and appeals therefrom, and all before ultimate adversary determination of the obscenity of any publication issue.

Is the foregoing immaterial as a matter of law under the First Amendment, as appellees contend, because there is no physical "seizure," because in terrorem suppressions

are justified under *Smith* v. *California*, 361 U. S. 147, 154-155 (1959), and because defenses to a series of fully matured criminal prosecutions (lasting over three years) furnish alleged procedural safeguards?

Is all the foregoing immaterial where preliminary adversary determination in the borderline area will positively avoid suppressions and unconstitutional prior restraints and at the same time be an effective vehicle for obscenity law enforcement?

Statement of the Case

1. When and How Federal Questions Were Raised and Decided.

Appellant Milky Way instituted an action for declaratory judgment and appropriate injunctive relief. Appellees moved to dismiss the complaint and opposed the motion. The three-judge district court refused to grant injunctive relief where it held: I. appellants had fatally delayed seeking the "speedy adjudication" available in the state forum (Criminal Court) and had not shown bad faith prosecutions undertaken knowing their accusations could not be sustained; II. that while sufficiently substantial constitutional claims were made, nonetheless as a matter of law Penal Law Section 235.00(1) was constitutional; III. the arrest warrant statutes were constitutional as applied in law.

2. The Undisputed Facts and Rulings of Law.

On May 21, 1969, the printer, distributor and publishers were arrested for promoting[1] issues nos. 14 and 15 of ap-

[1] Promote is the statutory term Section 235.05(1); this of course has nothing to do with a promotional advertising campaign in the pandering sense.

pellant Milky Way's weekly newspaper entitled "Screw; The Sex Review" for alleged violation of New York Penal Law Section 235.05 (obscenity law). Although these publication issues were not obscene, appellant Milky Way desiring to comply with the law, not to evade it, almost immediately requested appellee District Attorney to advise appellant's counsel of the alleged obscenity (*Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 72 [1963]), or to institute preliminary adversary determination proceedings prior to the distribution of any issue. On June 17, 1969 these first cases were adjourned until September 15, 1969.

On June 26, 1969, following warrant issued on *ex parte* judicial ruling that issue no. 17 of the paper was obscene, once again the publishers and distributor were arrested for promoting issue no. 17. Several newsdealers were arrested for promoting issue no. 17 without any warrant for their arrest. Upon the issuance of the warrant for promoting issue no. 17 (i) it thereupon became contraband, its sale illegal and thereupon all sales stopped; (ii) in addition there was a massive drop in sales of the subsequent issues nos. 18 and 19, even though these subsequent issues were not the subject of any ruling of obscenity in any proceeding, civil, criminal, *ex parte* or otherwise.

As the complaint and moving papers allege, issue no. 17 and the publication issues which follow are not patently offensive, in whole or in part (indeed pictures which might be deemed highly offensive even if not obscene were removed), in addition have considerable social value, are newspapers containing no fiction, but which report and review books, music, rock and roll performances, motion pictures and plays which are published and performed locally and throughout the country, carry interviews with people and contain articles reporting the ethics and right and wrong concerning sexual attitudes in our society, and are not pandered (publishers placed two outside advertisements in four months and have never conducted a promotional advertising campaign). None of the publication

issues are obscene. However, we will assume, *arguendo only* for procedural purposes, that all subject publications are borderline.

Sometime about the middle of July all efforts to compromise the matter with appellee District Attorney by a notice negotiation system to pinpoint the alleged obscenity or by suspensions of arrests pending the outcome of the cases, or both, failed. At the same time the District Attorney made it plain that he would vigorously oppose any motion in the Criminal Court made returnable before September. On August 15th once again there were simultaneous arrests of appellant Milky Way publishers, their distributor, the publishers of three other weekly tabloids, together with innumerable newsdealers without warrants for the arrests of newsdealers. As the complaint alleges, the publication was driven off the streets. As the complaint further alleges, a repetition of still further arrests, both threatened by appellee District Attorney and inherent in the existence of the procedural statutes, would destroy the publication long before the matter could be settled in three years or more via the criminal courts and appeals therefrom.

On August 18, 1969 this lawsuit was instituted. Appellants *New York Feed Co., Inc., et al.*, publishers of "The New York Review of Sex & Politics," likewise arrested on June 26th and August 15th, instituted a separate action. The actions were consolidated; on September 17, 1969 appellants motion for a three-judge court was granted, a hearing before the statutory three-judge court was held on September 24, 1969, and its decision rendered October 15, 1969.

Appellant Milky Way claimed (complaint Count II) that Penal Law Section 235.00(1) was an overbroad regulation of First Amendment rights failing to mandate in either the hard-core or borderline case that pandering and foisting on an unwilling public are essential mandated material elements of the crime of obscenity, and therefore must be

set forth in the statute. Appellees claimed that the New York statute was patterned precisely after the Maryland opinions of this court, and that appellants had misread *Redrup* v. *New York*, 386 U. S. 767 (1967) and *Stanley* v. *Georgia*, 394 U. S. 557 (1969). The court below, noting several decisions to the contrary, agreed.

Appellant Milky Way claimed under complaint Count IV, incorporating Count I allegations, that the arrest warrant statutes (C.C.P. 148-150) are both an overbroad and unduly vague statutory scheme as applied as a matter of law to regulate borderline obscenity; overbroad because the statutes control within their sweep both the normal criminal contraband and borderline publications which are not contraband; unduly vague because probable cause to believe a borderline publication might be found obscene is meaningless. Appellants alleged that the threat of still further arrests, a fourth, fifth or sixth series of arrests on the basis of ex-parte judicial rulings would not only cause further suppressions, but would also destroy appellants' publication and totally suppress it in fact long before the issues of the obscenity could be determined, settled or pinpointed via the criminal courts and appeals therefrom, thus making it impossible for appellants to effectively contest the legal issues in the State courts.

Appellees moved to dismiss the complaint, thus for motion purposes admitting the factual allegations of the complaint. Appellees claimed it immaterial as a matter of constitutional law that (i) upon the issuance of the warrant the publication issue, which was the subject of the warrant, thereupon became contraband, its sale illegal and no one in fact would sell it, or (ii) that there was therewith a massive suppression of sales of subsequent publication issues which were not the subject of any ruling of obscenity, *ex parte* or otherwise, or that (iii) repeated arrests on the basis of *ex parte* judicial determination can destroy a borderline publication. Appellees say the foregoing is immaterial as a matter of law because technically there was no

"seizure," and hence constitutionally no prior restraint, and economic extinction is, to quote appellee Hogan (Hogan memorandum to dismiss complaints, p. 22, R #18*), "an inherent problem attendant in the dissemination of any publication bordering on obscenity," justified under *Smith* v. *California*, 361 U. S. 147, 154 (1959). Appellees claimed *ex parte* judicial review procedures for arrests are constitutionally authorized under *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961); *People* v. *Rothenberg*, 20 N. Y. 2d 35, 281 N.Y.S. 2d 316 (1967); *People* v. *White*, 56 Misc. 2d 900, 290 N.Y.S. 2d 253 (Crim. Ct. N. Y. Co. 1968); *People* v. *Kozak*, 56 Misc. 2d 337, 288 N.Y.S. 2d 692 (Crim. Ct. N. Y. Co. 1968); and that defenses to criminal court prosecutions and the right of appeals therefrom afford adequate procedural safeguards.

In short, according to appellees, arrest warrant statutes with *ex parte* judicial rulings of obscenity as applied as a matter of law (under the "history and operation" of the statute[2]) are constitutionally authorized so that all the facts alleged in the complaint, even if true, are immaterial as a matter of law. The court below, in Part III of its decision noting several decisions to the contrary, agreed.

A word is in order about the number of arrests and the lower court's holding (Part I of its decision) that appel-

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* R stands for Index to Record on Appeal.

[2] Appellant Milky Way's moving memorandum relied on *Zwickler* v. *Koota*, 389 U. S. 241 (1967); *Cameron* v. *Johnson*, 390 U. S. 611, 615-617 (1968). In addition, appellants' moving memorandum pointed out that an attack on a state statute as violative of constitutional rights as appllied as a matter of law includes a consideration of the manner of its application under the "history and operation of the statute" including a consideration of state decisional law. *Goldstein* v. *Cox*, 391 F. 2d 586 (2d Cir. 1968) following vacatur of decision *Goldstein* v. *Cox*, 389 U. S. 581 (1968) based on *Zschernig* v. *Miller*, 389 U. S. 429. *Goldstein*, *supra*, remanded to three-judge court to consider attack on statutes as applied under the history and operation of the statute.

lants had fatally delayed in pressing for supposed speedy adjudications available in state forums, and bad faith."

The court below (A 7a) said that it was able "to find not more than thirteen arrests for all affected issues of 'Screw.'" Factually, as set forth in Appendix C, this is wrong. What the lower court undoubtedly meant, relying on the Police Department affidavit (Lt. Ralph Russo of September 29, 1969, R# 22), was that a ~~more thirteen~~ newsdealers were arrested. However, that does not take into account in addition the eleven separate cases filed against the printer, publishers and distributors of "Screw" set forth in Appendix C with docket numbers.

But as a matter of law it is immaterial. For the threat is inherent in the application of the procedural statutes. If there can be thirteen arrests, there can be twenty-two or sixty-five. Furthermore, there need only be one more arrest to stop all newsdealers from selling any issues. And today, effective September 1, 1969, under Penal Law Section 235.05(5), wholesale promoting an obscene publication by a printer, publisher or distributor is a Class D felony (Penal Law 235.06) carrying with it a sentence of up to seven years. So, therefore, if there is a repetition of the August 15th arrests charging three publication issues obscene, the printer, publisher and distributor face twenty-one years in jail. Thus the statutes (C.C.P. 148-150) as applied in law afford the procedural safeguards of facing twenty-one years in jail to test First Amendment rights to publish borderline newspapers.

As far as delay is concerned, after the May cases were adjourned to September, before the June 26th arrests, appellant Milky Way's counsel attempted to work out a notice system (Goldstein affs. Aug. 26, 1969 pp. 9-10, R#3, Sept. 16, 1969 p. 9, R#10), or a system for preliminary adversary determination, agreed to by the District Attorney, Bronx County (Schwarz aff. Aug. 27, 1969, Ex. 3,

R#3), or a suspension of arrests pending state court determinations, suspensions agreed to on other occasions by appellees (see Milky Way memorandum in opposition to Hogan motion pp. 11-12, R#23). In short, a compromise in June or July was not beyond the realm of reasonable possibility. When, in mid July, that failed, appellee District Attorney specifically advised they would vigorously oppose any motions to dismiss returnable in late July or August because of vacation time, which as a practical matter would make it almost impossible to have motions heard, at the same time intimating, though not definitely promising, that matters would remain at rest until September. Nonetheless on August 15th there were further arrests.

Thus, as alleged, the refusal of appellee Hogan to compromise the matter, the institution of the last of three sets of arrests, coupled with the blunt threat after the August 15th arrests of still further arrests upon *ex parte* judicial rulings (appellants memorandum in support of motion p. 5, R#4; complaint para. 18, 25; R#1; Schwarz aff. Aug. 27, 1969 p. 1, R#3); and especially the existence of the statutes capable of being applied at any time to continue these arrests, all while the criminal court cases and appeals therefrom were pending, made it plain appellants would not survive to be able to contest the issues in the state courts.

The history of borderline obscenity law enforcement uniformly shows that fully litigated motions or fully litigated trials require months to be processed in the Criminal Court (e.g., *People* v. *Stabile*, 58 Misc. 2d 905, 296 N.Y.S. 2d 815 [Crim. Ct. N. Y. Co.]—motion made September 1968, decided January 24, 1969), and years to be processed via appeals. One look at the reported decisions confirms this. This is not anybody's fault, neither that of the District Attorney, the Criminal Courts nor defense counsel. It is inherent for there is no such thing for the most part as a simple novel borderline obscenity case. In addition, where clients are faced with jail sentences, counsel is duty

bound to raise all defenses lest they be waived, and conscientious Criminal Court Judges if they are to do the matter justice of necessity must take time.[3]

Appellants, therefore, tried to explain and alleged over and over that the supposed speedy State Court remedies were nonexistent in reality; that it would take two to three months for appellants' motions in the Criminal Court to be heard and decided; that Criminal Court motions could be decided without even reaching the constitutional issues here raised; that it was not unreasonable to suppose that appellants as defendants in the Criminal Court might obtain on motion a dismissal of some of the publication issues as non-obscene on the face of them, but might also lose on obscenity grounds and on both constitutional issues here raised; that thereafter there would be trials as to the obscenity of some or all publication issues, and appeals on all legal issues; and most important, appellees had made it abundantly clear they would continue arrests on *ex parte* judicial procedures during this entire period; that this would result not only in continued suppressions of borderline publications, but would force appellants out of business, so that appellants would never be able to test to its ultimate conclusion any legal issues via the state courts; hence the relevant time periods to determine whether state court remedies were adequate in practice, not theory, to test subject constitutional issues were years, not months.

Since the lower court nonetheless found fatal delay because of a supposed speedy remedy (A8a), appellants

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[3] In addition, in the New York County Criminal Court at motion part there are approximately five hundred to seven hundred fifty cases a week, at which part one or two judges must hear pleas, applications for adjournments, motions and simple preliminary hearings. Complex motions such as are involved in motion of defendants (appellants here) in the Criminal Court are sometimes referred to another judge, as happened. Preliminary hearings merely determine whether there is some factual basis for connecting the accused to the crime, which has nothing to do with constitutional law issues of borderline obscenity cases.

note the following. In September appellee District Attorney requested an adjournment to October 15th. Appellants' Criminal Court motions to dismiss were made October 17th, oral argument held December 15th-16th, the court fixed January 27th for decision date; total, two to three months for motions, just as appellants said. And the Criminal Court motions might be decided on any of several grounds raised but not here involved, or appellants might well lose on the two constitutional law issues here involved, etc. Hence the constitutionally relevant time periods for determining the adequacy of state court remedies in practice, not theory, to test subject constitutional legal issues are years, not months, just as appellants said.[4]

Hard-core material is a manageable, rather well defined class. *Ginzburg* v. *United States*, 383 U. S. 463, 499 n. 3 (Stewart, J., dissenting); *Memoirs* v. *Massachusetts*, 383 U. S. 413, 457 (Harlan, J., dissenting); *People* v. *Stabile*, *supra*, 58 Misc. 2d at 909, 296 N.Y.S. 2d at 821; *People* v. *White*, *supra*. Assuming governmental power to ban hard-core (absent pandering and foisting), treating and permitting its public sales to be immediately stopped involves no overbreadth for hard-core is by definition and its nature obscene and hence contraband in the first place.

But that is not this case. A publication which is borderline is inherently, and by definition, a publication the ob-

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[4] *Rage Books, Inc.* v. *Leary*, 301 F. Supp. 546 (SDNY 1969) furnishes a good example of rights theoretical in nature but nonexistent in reality where confronted with multiple prosecutions initiated upon *ex parte* judicial warrant. As hereafter noted in greater detail, of the twelve cases encompassed in the federal complaint all were ultimately dismissed in the Criminal Court, many on the grounds of nonobscenity. Nonetheless Rage and its president and owner were forced out of business, principally because of inability to function in face of repeated arrests, regardless of the ultimate outcome, its federal appeal abandoned, so that in reality neither Rage nor its individual operating president could effectively test even the question of preliminary adversary determination in the federal or state courts.

scenity of which cannot be determined until after trial and all appeals. Nonetheless the *ex parte* judicial ruling of its obscenity immediately makes it contraband and its sale illegal (upon appellees' own view of the law) and therewith immediately obstructs, and indeed totally stops the sale of a publication issue which is not yet obscene. That alone renders the procedural statutes unconstitutional. For the statutes as applied in law interferes with and stops the right of the public to receive a publication issue, on the assumption it is already obscene, and hence contraband, whereas a borderline publication is by definition and unlike hard-core not at that point obscene, *A Quantity of Books* v. *Kansas*, 378 U. S. 205, 212-213 (1964), and see Stewart, J., concurring opinion at 214.

In addition, that very *ex parte* judicial ruling of the obscenity of one publication issue in fact suppresses the sales of thousands of copies of subsequent issues of the publication which are not the subject of any ruling, *ex parte* or otherwise. And when that process is repeated enough times, the publication is destroyed, regardless of its non-obscenity. There cannot be any real experimentation on a state level with borderline publications as envisaged by Mr. Justice Harlan, *Roth* v. *United States*, 354 U. S. 476, 505-506 (1957) (Harlan, J., dissenting), or on a national level if small publishers can be crushed in the process before they can finish the experiment.

Bad faith means prosecution undertaken on the facts where evidentiary-wise on the facts the prosecution is undertaken with no hope of success. But where statutes, substantive or procedural, are overbroad, or unduly vague facially or as applied in law, suppresions of First Amendment rights will occur by prosecutions undertaken without bad faith, because the statutes are overbroad, or unduly vague. Furthermore, appellants are not seeking to enjoin criminal prosecutions *per se*, but only to enjoin in the future the enforcement, operation and execution (28 U.S.C.

2281) of the statutes to the limited extent that prosecutions for promoting borderline publications be commenced after preliminary adversary determination.

SUBSTANTIALITY OF FEDERAL QUESTIONS

I. Penal Law Section 235.00(1) is overbroad for failing to include pandering and foisting on an unwilling public.

The court below held appellant Milky Way had misread *Redrup* v. *New York*, 386 U. S. 767 (1967), and the cases that follow it. Most courts, however, have read *Redrup, supra*, and *Stanley* v. *Georgia*, 394 U. S. 557, 566-567, as appellant does, to wit, that in the hard-core case, and certainly in the borderline or close case area pandering and foisting on an unwilling public are essential mandated elements which must be present. *United States* v. *4,400 Copies of Magazines*, 276 F. Supp. 902 (D. Md. 1967) (5 judges sitting *en banc*); *United States* v. *127,295 Copies of Magazines*, 295 F. Supp. 1186, 1188-1189 (D. Md. 1968); *Grant* v. *United States*, 380 F. 2d 748 (9th Cir. 1967); *Poulos* v. *Rucker*, 288 F. Supp. 305, 307 (M. D. Ala. 1968); *Stein* v. *Batchelor*, 300 F. Supp. 602 (N. D. Texas 1969); the broader implications of *Stanley* are that obscenity is fully protected. *Karalexis* v. *Byrne*, —— F. Supp. —— (D. Mass. Nov. 28, 1969, CA 69-665-J) (three-judge court) declaratory judgment holding Massachusetts obscenity law unconstitutional as overbroad; exhibition of motion picture in a theatre available to the adult public was fully protected regardless of whether the picture was obscene, unless it might fall into the hands of children, or "it might intrude upon the sensibilities or privacy of the general public," i.e., was a public nuisance. *People* v. *Billingsley* (Mich. Ct. App. Oct. 30, 1969 #5544-46), obscenity convictions on paperbacks reversed; the "opinion of the court [this court in *Redrup*] repeated but declined

to rest decision solely on the Roth-Memoirs test; it adverted to the opinions of the justices who regard that test as too narrow a view of the First Amendment."

In a free society people have a right to be free from intrusions in their homes, or in buses, *Breard* v. *Alexandria*, 341 U. S. 622 (1951); *Public Utilities Commission* v. *Pollak*, 343 U. S. 451 (1952); or while traveling along highways, etc. However, "the line between transmission of ideas and mere entertainment is much too elusive [to be drawn] * * *, if indeed such a line can be drawn at all." *Stanley, supra*, 394 U. S. at 567, correctly refers to *Roth* as a case dealing with public distribution of material with dangers that it might fall into the hands of children, or here pertinent, citing *Redrup, supra*, 386 U. S. at 769, that it might intrude upon the sensibilities or privacy of the general public.

Balanced against this, however, is the right to publish knowing that the State may not interfere and the statutory definitions forbid it to do so, certainly in the borderline case, unless publisher is pandering and foisting on an unwilling public.

Appellees make no claim that the New York statute is susceptible of the construction contended for by appellants, and the New York Court of Appeals has given no indication that it would so construe it. See *People* v. *Carlos*, 24 N. Y. 2d 865 (1969). The statute is overbroad.

II. The procedural statutes (C.C.P. 148-150) are unconstitutional as applied in law to borderline publications.

There is a clear conflict in the federal decisions in the various circuits. Louisiana, *Delta Book Distributors, Inc.* v. *Cronvich*, 304 F. Supp. 662 (E. D. La. 1969) (3 judges); Illinois, *Cambist Films Inc.* v. *Illinois*, 292 F. Supp. 185

(N. D. Ill. Oct. 1968); and Georgia, *Sokolic* v. *Ryan*, 304 F. Supp. 213 (S. D. Ga. 1969); all held, as the court below noted, an arrest without adversary determination violated First Amendment rights. In addition, a three-judge court in Florida, *Morrison* v. *Wilson* (N. D. Fla. Sept. 26, 1969 PCA 2110), granted a preliminary injunction enjoining law enforcement officials from making any further arrests for sale of publications believed to be obscene "without there having been a prior adversary hearing on and a determination of the question of obscenity in accordance with the requirements as set out in Marcus v. Property Search Warrant, 367 U. S. 717 (1961), and A Quantity of Books v. Kansas, 378 U. S. 205 (1964) and of a three-judge District Court in Delta Book Distributors Inc. v. Cronvich, Case No. 68-1927."

But far more than just federal decisional conflict is at stake. At stake is the right of small publishers, newsstands and small retailers throughout the country to publish and sell where they want to comply with the law, but their publications can be totally suppressed by the application of arrest warrant statutes. This is especially without justification where, as hereafter noted (II-B, *infra*), alternative procedures, including preliminary adversary determination, are available which positively will avoid unconstitutional suppressions, will avoid the chill and at the same time will be an effective vehicle for enforcing obscenity law in the borderline area.

The validity of any procedural statute controlling First Amendment rights is to be viewed pragmatically. The "judicial angle of vision" must focus "on the operation and effect of the statute in substance." A prior restraint is not a talismanic test, the substance counts, not the form, *Kingsley Books Inc.* v. *Brown*, 354 U. S. 436, 441, 442 (1957).

A. The procedural arrest warrant statutes as applied as a matter of law operate in substance as an unconstitutional prior restraint and suppression of borderline publications under any view of the law.

1. Where Procedural Statutes Can Destroy a Borderline Publication Before Ultimate Adversary Determination of Obscenity, and the So-Called Procedural Safeguards of Defending Multiple Prosecutions Are No Safeguards at All on Appellees' Own View of the Law, the Statutes as Applied Are *Per Se* Unconstitutional.

"The teaching of our cases" is that only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression. *Freedman* v. *Maryland*, 380 U. S. 51, 58 (1965). Nor is it constitutionally material that subsequent to the institution of *ex parte* judicial review the publisher may have the right in a full hearing to contest the obscenity because this does not eliminate the danger of interference with the "unobstructed circulation" of the publications. *A Quantity of Books* v. *Kansas*, 379 U. S. 205, 212-213 (1964). See also, *Lee Art Theatre, Inc.* v. *Virginia*, 392 U. S. 636 (1968), citing *Freedman*, *supra*, 380 U. S. at 58.

The institution of a criminal prosecution for promoting a borderline publication upon *ex parte* judicial ruling of its obscenity immediately obstructs and stops in fact the public circulation of a publication which by its very nature and definition, i.e., borderline, is not obscene and cannot be deemed obscene until after final adversary judicial determination. The arrest warrant statutes as applied in law are thus suppressing nonobscene publications and are therefore unconstitutional for this reason alone. (See Pt. II, A2, *infra*.)

And when the defense to a series of such prosecutions cannot possibly afford adequate procedural safeguards to

protect against the danger to abridgment of the right to unobstructed circulation of nonobscene books, on appellees' own view of the law, then the arrest warrant statutes as applied in law are unconstitutional beyond any shadow of a doubt.

How can it be otherwise? The appellees say that the suppressions which in fact occurred, the total destruction in fact of borderline publications which can result from the necessity of defending multiple criminal prosecutions is immaterial as a matter of constitutional law (i) under *Smith* v. *California*, 361 U. S. 147, 154; (ii) because there has been no "seizure"; (iii) because initiating criminal prosecutions upon *ex parte* judicial scrutiny is justified under federal New York case law. *Marcus* v. *Search Warrant, supra; People* v. *Rothenberg, supra; People* v. *White, supra;* see, also, *People* v. *Kozak, supra*[*] and (IV.) because defenses to criminal prosecutions further adequate safe guards.

But where the total destruction of the publication can flow from repeated arrests under the statutes based only on *ex parte* judicial ruling (as almost happened), and the existence of such statutes capable of being applied at any time can crush a borderline publication long before ultimate determinations after all appeals, the statutes operate in substance and pragmatically as an unconstitutional prior restraint, worse than any licensing or seizure statute ever drafted.

Smith v. *California, supra*, 361 U. S. at 154-155, relied upon by appellee Hogan and cited by the lower court, spoke of any criminal statute as "doubtless having *some* tendency

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[*] *People* v. *Richard Cohen*, No. B19991/1968, Crim. Ct. N. Y. Co. Sept. 17, 1968. Case dismissed on motion of District Attorney: "In borderline cases of obscenity we must have a prior [*ex parte*] judicial determination." This case, along with other cases cited, typifies the present New York law stemming from *People* v. *Rothenberg, supra*, to wit, that in borderline cases (just as the District Attorney said) *ex parte* judicial review is required, but no more than *ex parte* judicial review is required.

to self-censorship" and "*some* inhibitory effect" (emphasis supplied). However, appellee Hogan, it must be remembered, moved to dismiss and opposed appellants' motion on the ground that total destruction and "economic extinction" of a borderline publication "is not significant for federal purposes," is just "an injury * * * which always accompanies prosecution," and absent seizure, justified on *ex parte* judicial rulings as immaterial as a matter of constitutional law under *Smith* v. *California*.[6]

But economic extinction is far removed from some inhibitory effect. Appellants submit that *Smith* v. *California*, 361 U. S. at 154-155, has been twisted beyond anything therein contemplated. If procedural statutes can destroy a borderline publication by a series of arrests initiated on *ex parte* judicial scrutiny, before ultimate determinations of obscenity are made, such statutes have (i) increased the pressures toward self-censorship to a constitutionally unacceptable degree, to its zenith, total destruction; and (ii) defenses thereto cannot, on the face of it, guard against the danger of abridgment of the right of the public to unobstructed circulation of nonobscene publications. For on appellee Hogan's own statement, economic extinction, and hence total suppression of the publication in fact and total abridgment of the right of the public to possess the publication is, according to appellee Hogan, immaterial in law because in essence there is a criminal prosecution.

2. The Arrest Warrant Statutes (C.C.P. Sec. 848-850) as Applied as a Matter of Law Are Overbroad Statutes Controlling and Sweeping Within Their Reach Both the Usual Criminal Contraband and Borderline Publications Which Are Not Contraband.

Possibly obscene publications, and today even actually obscene publications, are not contraband, may not be equated with contraband, or controlled by statutes as if

[6] Hogan memorandum to dismiss complaints, pp. 2, 3, 22.

they were contraband. *A Quantity of Books* v. *Kansas*, *supra*, 378 U. S. 205, 211, 212 (1964); *Metzger* v. *Pearcy*, 393 F. 2d 202, 204 (7th Cir. 1968); *Stanley* v. *Georgia*, *supra*, 394 U. S. 557, 568 n. 11. The statutes (C.C.P. 148-150) on their face and as applied as a matter of New York law sweep within their reach and control and regulate the possession with intent to sell or sale of property which falls within two completely different categories: (i) the normal criminal contraband and (ii) borderline publications which may not be equated with contraband.

The foregoing is the operation of the statute as applied as a matter of law, under the history and operation of the case law, namely that upon *ex parte* judicial ruling that a publication is obscene, it thereupon becomes contraband, *People* v. *Rothenberg*, *supra*, relying on *Marcus* v. *Search Warrant*, *supra*; *People* v. *White*, *supra*; *People* v. *Kozak*, *supra*; thus rendering its sale illegal. Indeed, appellees defend their arrests of newsdealers without any warrant for the arrest of any newsdealer upon the legal theory that upon *ex parte* judicial ruling of obscenity of a particular publication issue, it thereupon became contraband and its sale illegal.

The entire purpose of procedural statutes (C.C.P. 148-150) is to control activities which are constitutionally subject to State regulation. "A governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broad," *Zwickler* v. *Koota*, 389 U. S. 241, 250 (1967).

Hard-core material is, as stated, a rather well defined manageable class. *Ginzburg* v. *United States*, 383 U. S. 463, 499 n. 3 (Stewart, J. dissenting); *Memoirs* v. *Massachusetts*, 383 U. S. 413, 457 (Harlan, J. dissenting); *People* v. *Stabile*, *supra*, 58 Misc. 2d at 905, 909, 296 N.Y.S. 2d at 821; *People* v. *White*, *supra*. Treating hard-core material as contraband within the scope and reach of *ex parte*

arrest warrant statutes justifying immediate arrest and restraints pragmatically makes sense; such material is obscene, hence contraband in the first place. But by definition a borderline or close case publication is one where its obscene character cannot be determined until after final judicial determination.

Nonetheless the following is the rule of law according to the lower court. A statute authorizing a seizure on warrant following *ex parte* judicial ruling treating publications as contraband is an unconstitutional First Amendment suppression. A statute authorizing an arrest following *ex parte* judicial ruling which (i) immediately upon the issuance of the warrant stamps a borderline publication as obscene, and contraband, making its sale illegal, subjecting everyone who sells it to "immediate forthwith arrest" (see complaint para. 10-A, R#1), and thus in fact totally suppressing it and (ii) suppressing subsequent publication issues which are not the subject of any ruling, *ex parte* or otherwise, violates no First Amendment rights since there is no seizure. This exalts form over substance. Appellees' legal position is so completely wrong and has done such enormous damage to First Amendment rights it must be restated.

Appellee Hogan piously proclaims that *ex parte* judicial ruling of the obscenity of a publication issue effects no prior restraint because newsdealers and distributors are theoretically free to continue its sales (since it had not been seized), and hence the fact that no one will sell such publication issue is immaterial in law. (Appellee Hogan's Memorandum of Law to Dismiss Complaints, pages 12, 21, R#18). Appellees' legal position, accepted by the lower court, ignores all realities. The fact (which appellee Hogan deems immaterial in law) is that upon the *ex parte* judicial ruling of obscenity of a publication issue, newspaper, paperback, magazine or otherwise, no one will sell it. It is, therefore, suppressed, just as if it had been seized, or burned. There

is no difference between the arrest and seizure except one, the arrest on *ex parte* judicial ruling is a more deadly restraint for it suppresses not only the publication issue which is the subject of the warrant, but subsequent publication issues as well.

3. The Statute (C.C.P. 148-150) as Applied as a Matter of Law Permitting Arrests on "Probable Cause" to Believe a Borderline Publication Obscene Is Unduly Vague.

The term "probable cause" to believe a borderline publication issue obscene, thus supporting *ex parte* judicial ruling, is unduly vague, indeed meaningless. Such a statute used to control First Amendment rights is unconconstitutional, *Baggett* v. *Bullitt*, 377 U. S. 360, 367, 374 (1964).

There is hopeless substantive law confusion in the field of bordeline obscenity, including shifting and unresolved definitions of pandering. (Examples, *People* v. *Carlos*, 24 N. Y. 2d 865 [1969]; *cf. People* v. *Stabile, supra; People* v. *Weingarten*, 55 Misc. 2d 681, 286 N.Y.S. 2d 429 [App. Tm. 1st Dept. 1967[7]]; many more could be given.) Hence there is almost always some decision somewhere which will lead to pressures to "take action" or which may justify probable cause for believing a publication

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[7] Prosecution instituted March 13, 1966 under former Penal Law Section 1141. The lower court, 50 Misc. 2d 635, 271 N.Y.S. 2d 158 (Crim. Ct. N. Y. Co.) held the paperback not hard-core, but obscene under March 1966 tests of this court, including pandering on back cover. The Appellate Term affirmed. The Court of Appeals reversed October 1969 (N.Y.L.J. Nov. 3, 1969, p. 2, col. 2) but only on the grounds that the lower court holding of non hard-core was on the facts under former Penal Law Section 1141. Hence the present law of obscenity of the printed word is one of unbelievable confusion. Here germane, this must be tripled in spades because the test for the suppression is not obscenity but only probable cause to believe that some court might find the printed word might be obscene.

might be deemed obscene,[8] thus justifying the *ex parte* judicial ruling with all its attendant suppressive consequences.

The jeopardy then is not the jeopardy of the obscenity statute, but principally the jeopardy of the *ex parte* judicial ruling on probable cause. For above all the publisher must avoid arrests regardless of the ultimate outcome of the case. Counsel, therefore, is not asked to interpret the obscenity statutes, but to determine when probable cause may exist. But no lawyer of common or above common intelligence, experienced in the obscenity field, can do anything but guess at whether one of several dozens of judges (who understandably do not have obscenity law decisions at their fingertips) might find probable cause to believe a borderline publication issue might be obscene, thus triggering off jail, fingerprinting and all the suppressions which immediately follow.

4. Bad Faith Is Immaterial; the Arrest Warrant Statutes as Applied in Law Afford "Safeguards" Only to Major Corporations or Purveyors of Hard-Core Pornography, But Not to Small Publishers Who Wish to Comply With the Law.

Bad faith prosecution means a prosecution undertaken on facts where an evidentiary hearing would show that on the facts a prosecution was undertaken with no hope of success. *Cameron* v. *Johnson, supra,* 390 U. S. at 619; *Zwickler* v. *Koota, supra.*[9] But if a statute is overbroad, or

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[8] See footnote 7.

[9] The lower court comment (A-11a, n. 8) that *Zwickler* involved no pending State case does not distinguish *Zwickler* on any meaningful ground. *Zwickler* (389 U. S. at 253) wanted to continue distributing leaflets free from the threat of criminal prosecutions. Here the institution of the pending criminal cases underscores the reality of the threat of still further prosecutions. For it was, as alleged over and over, the third series of August 15th arrests coupled

(*footnote continued on following page*)

unduly vague, a prosecution could almost always be undertaken with some hope of success because it was overbroad, or unduly vague.

A G. P. Putnam's Sons, a Grove Press or Keystone Reader Service and their retail representatives can afford a possible 30-day misdemeanor jail sentence in one or two states and the large expenditures financing one or two test cases via the Criminal Court and appeals, while these publishers survive on other publication items in their line. No small publisher in the country can do that . . . He must publish, or the publication will die. The so-called procedural safeguards then of defenses to criminal actions are safeguards available firstly to major corporations who can survive on other items.

Defending criminal prosecution also affords safeguards for wholesale promoters of hard-core pornography who produce and sell in a clandestine secret manner. The presumptions of innocence of the facts help promotors of

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(*footnote continued from previous page*)

with the blunt statement of appellee Hogan's office that it would continue such arrests on *ex parte* judicial scrutiny and would not suspend such procedures while the Criminal Court cases and appeals were pending that left us no alternative but to proceed in the Federal Court. To appellants the institution and pendency of present criminal prosecutions, together with the threat to continue the prosecution under present procedures, emphasizes the reality and immediacy of the threat, and the concreteness of the dispute. According to the lower court comment, it would seem that the more removed the threat, the greater its mootness, the more applicable *Zwickler* would be. Appellant respectfully submits it to be the other way around. As for Cameron's instituting the action in three days, appellants were attempting to negotiate the matter, not without some possibility of success; the District Attorney of Bronx County had agreed to preliminary adversary determination. See Schwarz aff. Aug. 27, 1969, Ex. A, R#3. Appellants did not want still further litigation if the matter could be settled reasonably. Appellants came to the federal court when our backs were against the wall.

hard-core pornography, just as it aids anyone engaged in criminal conduct who wants to shield the facts. But for the small publisher or distributor who openly sells his borderline publications[10] this presumption and safeguard is of no consequence whatsoever.

For such publisher (or distributor) there is seldom if ever any fact question as to the name or identification of the publisher or date or the fact of the publication, for they have no interest in concealing these facts, to the contrary they must make these facts known to the public. What, then, are the presumptions and safeguards? A two-hour *ex parte* judicial scrutiny of a publication is followed by a warrant and information charging that the publisher (for example) on June 26th promoted issue No. 17 of Screw, facts which nobody would or could question. The presumption of innocence of the facts, therefore, is a meaningless safeguard. The next presumption is that upon issuance of the warrant the publication issue is obscene, and of course it is suppressed. The next safeguard afforded publisher is to come to court to prove the publication is not obscene. The criminal law presumption of innocence until proof of guilt beyond a reasonable doubt is of no significance on the constitutional law questions of obscenity.

So then *ex parte* judicial scrutiny casts upon the publisher, printer, distributor and newsdealer the burden of preparing a complex borderline obscenity case, with motions, expert witness, and constitutional law or mixed law fact questions on community standards, pandering, etc., with jail at stake.

Passing for the moment the unconstitutionality of the immediate suppression of the publication issues which are the subject of the warrant, and suppression of subsequent

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[10] As stated, the complaint alleges subject publications are not obscene; indeed, they are not borderline, but we have assumed they are borderline for evaluating the procedural questions.

publication issues, one or two such criminal cases and appeals are livable. But when this process can be repeated at any time, with repeated suppressions and destruction of the business and thus total suppression of the publication, while the publisher is trying to defend himself via the state courts, the so-called procedural safeguards are non-existent.[11]

The inherent unconstitutionality lies in the application of the procedural statutes with *ex parte* judicial rulings to borderline publications. Where publications are hard-core, and involve the kind of hard-core activity proscribed in any event, processing the cases as normal criminal cases is justified.

But by definition a borderline publication is one whose obscenity cannot be determined until after full adversary determination, but nonetheless is suppressed and treated as if obscene and contraband without even a preliminary adversary determination of its obscenity. For one who openly publishes a borderline publication, the fact presumptions available to a defendant in a criminal trial are of no consequence whatsoever. For a small publisher who

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[11] *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. at 69-70, did *not* purport to analyze this question in the concrete context of defending multiple prosecutions. *Rage Books Inc.* v. *Leary*, 301 F. Supp. 546 (SDNY 1969) is a good example of the so-called procedural safeguards of defending multiple prosecutions. Of the twelve criminal prosecutions encompassed in the federal complaint, four of them against the owner, every one of the twelve cases was dismissed in the Criminal Court, mostly on grounds of nonobscenity. Nonetheless, the owner could no longer face the prospect of repeated arrests nor could hire competent employees who were willing to do so, and principally on this account was forced out of business completely and went into an entirely unrelated business. Of course the appeal in the federal court was abandoned. Appellants present counsel represented plaintiff Rage and the owner, and hence has personal knowledge of the facts, and represents it to be so as an officer of this court.

cannot wage repeated contests, the safeguards are no safeguards at all.[12]

B. Suppressions of borderline publications stemming from the application in law of the arrest warrant statutes are totally without justification where alternative methods will avoid suppression, enable publisher to comply with the law and enable law enforcement officials to effectively enforce the law.

The unconstitutionality of the arrest warrant statutes as applied to borderline publications is totally unjustified where there are alternatives which will enable publishers to comply with the law and at the same time enable law enforcement officials to effectively enforce the obscenity laws. These alternatives as proposed by appellants (see Goldstein Aug. 26, 1969 aff. pp. 8-10, R. No. 3 and Goldstein Sept. 16, 1969 aff. p. 9, Ex. B, R. No. 10) include negotiation procedure (*Bantam Books* v. *Sullivan*, 372

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[12] Appellants also pointed out that the Criminal Court lacked injunctive relief power, and even a favorable determination by a Criminal Court Judge was not binding on other Criminal Court Judges. The lower court said that in the absence of demonstration that defendants would persist upon invalidated statutory premises, the lower court would not assume it. But this overlooks the fact that the People may feel compelled or obliged to test the question in more than one instance, as the People have done on other occasions or that an Appellate Term may reverse.

Appellants also point out in passing that a declaratory judgment in the state courts to determine whether publications are obscene is not available, *Rogerin Associates, Inc.* v. *Hogan*, No. 8790/1964, Sup. Ct. N. Y. Co. 1964. In this case, personally handled by appellants' counsel several years ago, and after *Bunis* v. *Conway*, 17 A. D. 2d 207, 234 N.Y.S. 2d 435 (4th Dept. 1962), the Supreme Court, New York County, held declaratory judgment was not available to test the obscenity issues, but that such question must be raised by defenses in the Criminal Court.

U. S. 58, 72; *Poulos* v. *Rucker*, 288 F. Supp. 305, 310 (M. D. Ala.); use of C.C.P. Section 22-a, and preliminary adversary determination which need not be a fully mature action at law, *Tyrone* v. *Wilkinson*, 410 F. 2d 639, 641 (4th Cir. 1969).

The court below opined that preliminary adversary determination, spelling "defeat" at an earlier stage, would not serve to avoid the "chill" or the "prior restraint." That conclusion is totally wrong on the undisputed facts. Let us assume, arguendo only, that upon preliminary adversary determination a court would have found probable cause for believing issue No. 17 of the publication obscene. Such determination would have stopped the sale of issue No. 17, for after the preliminary determination of its obscenity no one would promote it. But at the same time no one would have been arrested unless they promoted issue No. 17 after the preliminary adversary determination. Thus, the publishers could have definitively advised newsdealers that there was no adverse determination of the obscenity of issues Nos. 18 or 19, and therefore the legality of promoting them was not open to question. Hence preliminary adversary determination would have totally avoided any and all suppressions of issues Nos. 18 and 19.

Newsdealers and retail stores cannot possibly draw refined distinctions between publication issues. A newsdealer asks a basic question—Can I sell a publication issue without being arrested? With preliminary adversary determination a publisher can give a clear answer—Yes, there has been no adverse determination, you may sell it ergo no suppression and no chilling effect and no prior restraint.

Let's take the printer, the first of whom refused to print after the first arrest regardless of the obscenity. (See Buckley July 29, 1969 aff. p. 3 R. 3.) The printer could print free from the fear that for one mistake he faces the prospect of defending himself against a seven-year jail sentence. Just how temporary immunization from crimi-

nal prosecution by preliminary adversary determination can have a potential chilling effect on anyone (as the lower court said), escapes the understanding of appellants' counsel.

Furthermore, preliminary adversary determination as to the particular issue (in our example, No. 17) by permitting both parties to be before the court would, in the borderline area with its sometimes impossibly refined distinctions, force a pinpointing of objections and assure a rapid delineation of the guidelines without forcing publishers or distributors to repeatedly defend fully matured criminal actions at law. Furthermore, the assumption of a "defeat" at this stage is not justified. However, assuming, as the court below did, a "defeat" at this stage, a publisher would be no worse off. The publisher could still promote the publication and have a fully litigated criminal trial. The difference is that the publisher would have an opportunity to control and have a voice in the number of cases. It would permit of the envisioned experimentation flexibility on the state level, *Roth* v. *United States*, *supra*, 354 U. S. at 505, 506 (Harlan, J. dissenting), and on the national level.

To the best of appellants' counsel's knowledge, everyone, publishers, distributors, retailers and their attorneys uniformly recognize that preliminary adversary determination would not only work but would positively avoid the present chill. In any event appellants are confronted with the practical operating realities of the matter. Intending no disrespect, appellants submit that where appellants solicit preliminary adversary determination, appellants are in a better position to evaluate its impact than the lower court.

Rage Books Inc. v. *Learn*, *supra*, held preliminary adversary determination would hobble obscenity law enforcement. That, too, is completely unfounded. A California publisher of magazines and paperbacks, a New York pub-

lisher of a weekly newspaper, have print runs of 20,000 to 100,000 copies. A preliminary adversary determination need not be a fully matured action at law, *Tyrone, Inc.* v. *Wilkinson, supra,* 410 F. 2d at 641. A preliminary adversary determination of the obscenity of an issue would constitutionally authorize an arrest and seizure for thereafter promoting the publication issue. It would contitutionally immediately achieve law enforcement objectives of banning the obscene material. It would cause the publisher to lose, in most instances, the entire cost of the print run and all profits. Publishers obviously could not afford repeated preliminary adverse determinations of obscenity. Hence preliminary adversary determination would compel a publisher to be careful not to go overboard and would be a very effective method of enforcing the obscenity law. At the same time it would be a sensitive tool for pinpointing objections and avoiding the total suppressions which now occur.

Assuming constitutional power to ban hard-core pornography and to stamp as obscene even certain borderline publications, present statutory *ex parte* judicial scrutiny procedures penalize most those who are trying to comply with the law, and are trying to be reasonable in an era of sometimes total irrationality. It penalizes the most the small publisher or retailer, who unlike major corporations cannot test case one publication at a time. The ability to test First Amendment rights should not turn on the size of the corporation, and to paraphrase the statement, when the judiciary loses that fixed star of constitutional adjudication, we will all lose our way. There is no absolute freedom, and rights must be balanced. And so under the First Amendment there is no justification for repeated suppressions where there are available sensitive tools which will avoid suppression and at the same time enable law enforcement officials to effectively enforce the obscenity laws.

The issues are substantial and require plenary consideration by this court with briefs on the merits and oral arguments.

Respectfully submitted

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APPENDIX A

Decision of Court Below

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MILKY WAY PRODUCTIONS, INC., *et al.*,

Plaintiffs,

—against—

HOWARD R. LEARY, *et al.*,

Defendants.

(69 Civ. 3638)

NEW YORK FEED CO., INC., *et al.*,

Plaintiffs,

—against—

HOWARD R. LEARY, *et al.*,

Defendants.

(69 Civ. 3808)

Appearances:

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Appendix A

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Before:

FEINBERG, Circuit Judge, and
MURPHY and FRANKEL, District Judges

FRANKEL, D.J.

Appendix A

This three-judge court has been convened to consider applications for injunctive and other relief by plaintiffs in two consolidated cases who assert that their rights under the First Amendment, as it applies via the Fourteenth, are being infringed by state arrests and prosecutions on obscenity charges.

In one case plaintiffs are Milky Way Productions, Inc., and two of its officers, engaged in publishing a weekly tabloid called "Screw, The Sex Review." The other suit is brought by New York Feed Company, Inc., and Stephen Heller, who publish a bi-weekly tabloid entitled "The New York Review of Sex & Politics." Defendants in both cases are Howard R. Leary, Police Commissioner of New York City, and Frank S. Hogan, New York County District Attorney.

The publishers of "Screw," in their complaint filed August 18, 1969, charge that defendants, in May of 1969, "embarked upon a plan and series of acts the purpose and effect of which has been to suppress the public sale of several issues of subject tabloid newspaper and to deprive the public of its right to read the tabloid and now threatens to suspend completely the publication and dissemination of subject tabloid." Specifically, it is charged, plaintiffs Goldstein and Buckley were arrested in May and charged with violating New York Penal Law §235.05[1] by promoting Issues No. 14 and No. 15 of "Screw." Thereafter, the complaint continues, the plaintiffs were advised by their counsel that "the only real basis to justify the

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[1] "A person is guilty of obscenity when, knowing its content and character, he * * * [p]romotes, or possesses with intent to promote, any obscene material * * *." Effective September 1, 1969, the statute was amended in minor respects not pertinent here.

arrests" was found in certain pictures, and they "proceeded in subsequent Issues to eliminate those pictures which apparently were deemed or appeared to be most objectionable."

Nevertheless, it is alleged, Goldstein and Buckley were arrested again on June 26, 1969, again on charges under §235.05, because of their Issue No. 17. At the same time, "the distributor and several newsdealers" were arrested for promoting this issue. Moreover, plaintiffs charge, since May 21 "defendants, and particularly members of the Police Department, told, advised and threatened newsdealers and others that they would be arrested for selling any Issue of the publication Screw, including, of course, Issue No. 18 which was not subject to any process, civil or criminal."

As a result of these official actions, plaintiffs allege, sales of their Issues 18 and 19 have dropped from a former level of 75,000 to about 17,000. And this has happened, they say, even though "defendants * * * are or should be fully aware that Issues No. 17, 18, 19, 20 * * * did not and do not contain pictures falling within the definition of hard-core pornography, to wit: pictures showing a consummated sexual act."

The complaint goes on to allege "still further arrests" on August 15, 1969, for promoting Issues 22 through 24.

According to the complaint, defendants have been asked, but have refused, to employ alternative procedures, such as civil injunctions or informal advance consultations with plaintiffs, in lieu of criminal charges under the obscenity statute.

As a result of the acts alleged, plaintiffs say, their business is being destroyed and First Amendment freedoms

are being chilled. Allegedly lacking any other adequate remedy, they seek (in addition to damages) injunctive and declaratory relief of kinds, and on grounds more particularly stated below.

Plaintiffs in the second case, publishers of "The New York Review of Sex & Politics," plead a similar cause, with some variations. On June 20, 1969, they allege, plaintiff Heller, "among others," was charged with violating Penal Law §235.05 on the basis of the "Review's" Issue No. 9. In addition to Heller, Alvin Druss, principal of a distributing company, and "a number of newsstand dealers" (not named) are alleged to have been arrested. Circulation of the "Review" has dropped from 40,000 to 30,000. 193 newsstands carried it before June 20, but the number has since decreased to about 75. It is alleged that Heller was arrested again on August 15, 1969, this time for Issue No. 12 of the "Review." On this occasion, it is alleged, "some 70 or less [*sic*[2]] newsstand dealers, some of whom are blind, others who are handicapped and disabled," were also arrested. Unlike the complaint about "Screw," that concerning the "Review" makes much of the allegedly "tasteful" and otherwise valuable aspects of the publication, but this dubiety turns out to have little or no significance for purposes of the questions before us.

The alleged pattern of arrests, said to be pursued "recklessly and promiscuously," is assailed as an "effective prior restraint" forbidden by the Federal Constitution. Moreover, plaintiffs allege, with arrests being made before there has been an adversary ruling on obscenity, "defendants are acting in bad faith in that they are attempting to accomplish, and are in fact accomplishing, by extra

[2] The affidavits hereinafter discussed suggest that the word "less" pushes the approximation toward accuracy.

judicial means what could not be achieved if the legal processes were followed." As in the companion case, plaintiffs connected with the "Review" seek both damages and injunctive relief.

By motions returnable on September 16, 1969, both sets of plaintiffs have applied for relief *pendente lite*. While the motions are not identical, the sum total of the relief sought and the contentions raised by both may be outlined as follows:[a]

(1) Temporary injunctions are sought

(a) to forbid arrests unless there has first been an adversary hearing before a judicial officer to determine whether the publications in question are obscene;

(b) to require that defendants negotiate and "pinpoint" alleged qualities of obscenity before instituting criminal proceedings;

(c) to forbid threats of arrest or warnings by police officers to newsdealers that sale of the publications will or may lead to arrest.

(2) Declaratory rulings are requested invalidating N. Y. Penal Law §235 in several respects hereinafter detailed.

(3) Likewise, a declaration is sought that §§148-150 of New York's Code of Criminal Procedure are

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[a] Neither plaintiff joins in all the arguments or prayers of the other. The "Review" plaintiffs, for example, did not move initially for declaratory relief. The "Screw" plaintiffs have not joined in the attack upon the statutory presumptions, considered under "IV," *infra*. It simplifies things a little, however, and harms no one, to cumulate the several subjects in a single summary and treat them *seriatim* later on.

unconstitutional facially and as applied because they assertedly allow suppression of publications as "contraband" without a prior adversary hearing, contrary to the claimed protections of the First and Fourteenth Amendments.

(4) The convening of a three-judge court is urged—successfully, as this opinion indicates.

Defendants for their part have been permitted to cross-move for dismissal of the complaints, plaintiffs having waived the normal notice requirements.

In the papers filed for and against the motions, the broad outlines of the complaints are retraced, but with some notable modifications and additions. The alleged dates of arrests and the affected issues of the two publications are confirmed in the affidavits. The total of arrests appears to be sharply diminished; despite the bland assertion of undocumented numbers in plaintiffs' papers (with no detail and no ultimate weight even as affidavits go), we are able to find not more than 13 arrests for all affected issues of "Screw" and 5 for the affected issues of the "New York Review."

As against the complaint allegations that plaintiffs are being crushed by delayed vindication of their First Amendment rights, it has been shown without dispute that plaintiffs have acquiesced since May and June in the postponement of the pending state criminal proceedings. They have neglected during a summer and beyond to press for their right to speedy state adjudications or even to raise in the state courts the issues of constitutional law they want this court to decide.

Appendix A

Upon the foregoing facts, for reasons which follow, we have concluded that plaintiffs' motions must fail but that their complaints, if only narrowly, should survive defendants' motions to dismiss.

I.

Assuming in plaintiffs' favor a negative answer to the question whether 28 U.S.C. §2283[1] applies to cases like this one, cf. *Dombrowski v. Pfister*, 380 U. S. 479, 484 n.2 (1965); and see *gas Cinema, Inc. v. Vergari*, 298 F. Supp. 1175, 1178 (S. D. N. Y. 1969), appeal pending, no sufficient case is made for an injunction. To begin with, plaintiffs' claim founders because they cannot show the extraordinary need required to justify such rare interferences with state criminal processes. Their heavy burden is to demonstrate that this is one of the "exceptional cases" where this kind of relief is essential "to prevent irreparable injury which is clear and imminent . . . ." *Douglas v. City of Jeannette*, 319 U. S. 157, 163 (1943); and see cases collected in *Richardson v. Dudley*, 295 F. Supp. 181, 185 (S. D. N. Y. 1969) (three-judge court). The burden is not met by plaintiffs such as these who have had an available state forum for their claims over a period of three or four months, have been entitled to speedy adjudications in that forum, *Freedman v. Maryland*, 380 U. S. 51 (1965), and have chosen simply to bypass that avenue of relief in favor of seeking federal

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[1] "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

intervention.[1] If such delay and disregard of state processes pending the arrival of self-inflicted "emergencies" could meet the test for a federal injunction, the abrasive device would promptly lose its "exceptional" character and would become a commonplace irritant.

Apart from the problem of fatal delay, plaintiffs' prayer for an injunction lacks the central element of *Dombrowski*, the basic case they invoke, namely, a substantial indication of "bad faith" in the pending state prosecutions. See *Cameron* v. *Johnson*, 390 U. S. 611, 619 (1968); *id.* at 623 (dissent); *Robinson* v. *Bradley*, 300 F. Supp. 665, 667 (D. Mass. 1969) (three-judge court). While there is a passing allegation of "bad faith" in the moving papers for "Screw" (Schwarz affidavit at 8), and the same phrase appears in the "Review" complaint (par. 34), the plaintiffs consistently deny that they must show "bad faith" prosecution. It is evident, moreover, that their use of the quoted words has a special and inapposite meaning—to describe the omission of adversary proceedings before arrest, which is a separate subject to be considered below.

In any event, the requisite bad faith has not been shown. In fact, beginning with the prosecutions of the "Screw" people in May, the papers and the oral submissions give a convincing picture of careful, discriminating prosecutions in *good faith*. Counsel have been enormously cir-

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[1] Plaintiffs do not show inadequacy of the state procedures in any material sense. Cf. *Palmore* v. *Dillon*, 386 F. 2d 74, 74 (2d Cir. 1967). They say that vindication of their attacks upon the state statutes in the pending criminal cases will not serve to terminate or prevent other prosecutions. In the absence of a demonstration that defendants would persist in proceeding upon invalidated statutory premises, we should not and will not assume it. This is sufficient answer even apart from our doubts that the state scheme of remedies is as barren as plaintiffs say it is.

cumspect on the subject, but the strong inference from what they do say is that the copies of "Screw" underlying the May charges closely approached the badlands of "hard-core pornography."[6] Similarly, there is nothing beyond bald assertion to indicate that defendants have brought charges or made arrests based on issues of the "Review" while knowing their accusations could not be sustained.[7]

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[6] Tying this to their argument that the prosecution ought to arrange a system of advisory opinions, plaintiffs in the *Milky Way* case tell us they realized there were pictures in the May issues which could lead a good-faith prosecutor to a determination of hard-core pornography. This was remedied, plaintiffs tell us. They proceed then to submit copies of the later, supposedly "purified" issues, which have also led to prosecutions, but none of the May numbers. The later items before us, whether "obscene" or not (which we are not asked to decide), contain noticeable amounts of naked people, flaunted genitalia, and suggestive postures, all in an environment of sophomoric smut that somebody may have thought to reflect liberated sophistication. Anatole France may not have deserved the stricture, but Mr. Justice Holmes would not even have wasted on this stuff the observation that this "sex talk has none of the charm of really felt lubricity." 1 *Holmes-Laski Letters* 414 (Howe ed., abr., Atheneum 1963). Since we have not been told in September what was in the admittedly lustier pages of May, we find no joy or utility in guessing. It is enough that the whole picture reflects nothing to suggest the "hopeless" prosecution solely for harassment which is the essence of *Dombrowski*-style bad faith.

[7] Further claims for injunctive relief have been noted and found frivolous, at least on the showing now before us. The alleged pattern or scheme of "threats" is not even adumbrated by the scattered (and disputed) instances reported by affiants who appear to have been soliciting the assertedly repressive remarks. The contention that prosecutors must consult, or negotiate before bringing obscenity charges, whether or not the idea might point toward a useful form of collaboration, is without basis in constitutional law.

Appendix A

This leaves the prayer for declaratory relief a distinct subject under cases like *Zwickler v. Koota*, 389 U. S. 241 (1967), and *Cameron v. Johnson*, 390 U. S. 611 (1968). The cited decisions indicate that declaratory relief may be available even if an injunction is not where unconstitutional claims of vagueness of overbreadth are lodged against a statute touching First Amendment freedoms. Even those decisions, however, leave largely intact the long-standing principle that "[a] declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest." *Eccles v. Peoples Bank*, 333 U. S. 426, 431 (1948), quoted in *Public Affairs Press v. Rickover*, 369 U. S. 111, 112 (1962). There is no indication that cases such as a state proceeding affecting areas of First Amendment freedoms is an automatic candidate for duplicative and unnecessary conflicting decision or a concurrent federal suit for declaratory relief.*

In an effort to harmonize the general principles of discretion with the special forms of First Amendment protection implemented by *Zwickler* and *Cameron*, we conclude that the subjects of vagueness and overbreadth—available in any suit within the original reach of the federal injunction, *N. A. A. C. P. v. Button*, 371 U. S. 415, 432 (1963); *Thornhill v. Alabama*, 310 U. S. 88, 97-98 (1940); *Winters v. New York*, 333 U. S. 507, 515-516 (1948)—

* It should be mentioned that both *Zwickler* and *Cameron* will be distinguishable in those actions brought to enjoin state proceedings like the ones here. In *Zwickler* there was no pending state case at all but only a declaratory complaint in federal court on state grounds and leaving the problem open for the state courts. In *Cameron* the federal complaint was filed after the state proceedings had been concluded. Both *Zwickler* and *Cameron* were followed by denial of the federal suit. *Zwickler*, 389 U. S. at 244.

permissible for declaratory relief. Cf. *Robinson* v. *Bradley, supra*, 300 F. Supp. at 669. On this thesis, we will render a declaration on the subject covered under Point II, *infra* (facial unconstitutionality of Penal Law §235). For comparable reasons, we reach the claimed right to an adversary hearing before arrest (Point III, *infra*), but not the complex mix of fact and law involved in the contention that the presumptions in Penal Law §235.10 must be deemed "irrational" and therefore unconstitutional (Point IV).

II.

The substantive portions of Penal Law §235 are attacked on three grounds, all of which we hold to be mistaken.

(1) The main claim is that the definition of "obscene" in §235.00(1) is invalid on its face because it embodies only the three "tests" set out in *Memoirs* v. *Massachusetts*, 383 U. S. 413, 418 (1966), as derived from *Roth* v. *United States*, 354 U. S. 476 (1957), and intervening cases. Two more "tests," plaintiffs assert, were added by *Redrup* v. *New York*, 386 U. S. 767 (1967)—that there be "pandering" and "foisting upon an unwilling public."

Plaintiffs misread the *per curiam* opinion in *Redrup*. As shown by the fuller opinions from which they derive, the supposedly additional, and allegedly essential, "tests" are only *permissible* kinds of relevant *evidence* which may serve in a close case to tip the balance toward a finding of obscenity. The basic thought appears first in separate opinions of Chief Justice Warren. See *Roth*, 354 U. S. at 495 (concurring opinion); *Jacobellis* v. *Ohio*, 378 U. S. 184, 201 (1964) (dissent). It takes firmer root in the opinion of Mr. Justice Brennan (joined by the Chief Justice and Mr. Justice Fortas), delivering the Court's

judgment in *Memoirs*, *supra*, where he said (383 U. S. at 420):

> "On the premise, which we have no occasion to assess, that *Memoirs* has the requisite prurient appeal and is patently offensive, but has only a minimum of social value, the circumstances of production, sale, and publicity are relevant in determining whether or not the publication or distribution of the book is constitutionally protected. Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance."

The idea reaches full bloom with Mr. Justice Brennan's majority opinion in *Ginzburg v. United States*, 383 U. S. 463, 470-473 (1966) (evidence of "pandering is relevant to the application of the *Roth* test" *id.* at 474).[6]

Nothing in *Redrup* changes the scope or effect of these added "tests." There is no support in that or any other decision of the Supreme Court for the view that they must be satisfied *in addition* to the three tests of *Memoirs* before a finding of obscenity is permissible. The standard

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[6] Mr. Justice Harlan, dissenting in *Ginzburg*, read the "majority views" on "the pandering test * * * as constitutional doctrine" rather than "a statutory gloss * * *." *Id.* at 494. His analysis does not help the plaintiffs here. The effect of the doctrine as he saw it (*id.*) was to provide an average toward a finding of obscenity which would otherwise not exist. He found it serving, in other words, to narrow, not broaden, the area of First Amendment protection. There is no basis for a position that state legislatures are required to incorporate such restrictive approaches in their statutes regulating obscenity.

as laid down in *Memoirs* was cited with approval as recently as *Stanley v. Georgia*, 394 U. S. 557, 568 (1969). For a view of the precedents similar to ours, see *United States v. 77 Cartons of Magazines*, 300 F. Supp. 851, 853-54 (N. D. Cal. 1969).

It bears mention, however, that plaintiffs are not alone in their contrary thinking. In *United States v. 4,400 Copies of Magazines, Etc.*, 276 F. Supp. 902 (D. Md. 1967), the five Judges of the District of Maryland, sitting *en banc*, unanimously ruled for the claimant in a condemnation case under section 305 of the Tariff Act of 1930, 19 U.S.C. §1305, on the explicit ground that *Redrup* has added cumulative, and therefore narrowing, "tests" of obscenity. While it found the magazines before it the lewdest it had ever considered, appealing more blatantly than any before to prurient interest, and devoid of social value, the Court held it impossible to sustain forfeitures for obscenity. Explaining what it saw as the decisive impact of *Redrup*, the Court said (at 904):

> "It appears * * * that persons to whom the magazines will be offered commercially, and the methods by which they will be offered, are factors to be considered in determining whether their dissemination is protected by the First Amendment.
>
> "Since the magazines involved in the present case have not yet been admitted into the United States, we cannot be sure how they will be marketed—(a) whether they will be sold to juveniles, either by mail solicitation or over the counter, (b) whether they will be offered for sale in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to them, and (c) whether they will be offered for sale in a manner which will amount to pandering.

> "This Court is, therefore, of the opinion that it cannot order the condemnation and forfeiture of these magazines at this time. On the other hand, this Court is of the opinion that if the magazines involved in this case are sold to juveniles, or are offered for sale in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to them, or if they are offered for sale in a manner which amounts to pandering within the principles stated in Ginzburg v. United States, 383 U. S. 463 at 465-466, 467, 470-471, 474-476, 86 S. Ct. 942, 16 L. Ed. 2d 31, they would not be entitled to the protection of the First Amendment. See Donnenberg v. State, 1 Md. App. 591, 232 A. 2d 264, 271 (1967)."

See, likewise, *United States v. 127, 295 Copies of Magazines, Etc.*, 295 F. Supp. 1186, 1188-89 (D. Md. 1968) (Thomsen, C.J., and Northrop, J.); and see *Grant v. United States*, 380 F. 2d 748 (9th Cir. 1967); *Poulos v. Rucker*, 288 F. Supp. 305, 307 (M. D. Ala. 1968) (interpreting *Redrup*, and the reversals without opinion in its wake, "as indicating that it is indeed a rare book that, solely on the basis of its content, is not entitled to constitutional protection").

Having attended respectfully to the apparent holdings in the Maryland District Court and the somewhat parallel observations elsewhere, we adhere to the position that the New York statute survives the opinion in *Redrup*.[10]

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[10] At the same time, we find enough in the way of utterly respectable disagreement to reject defendants' plea that this three-judge court be dissolved because no question of sufficient substance justified its convening.

(2) We can give shorter shrift to the argument that the New York State Legislature was bound to limit its proscriptions to "hard-core pornography" after the decision in *People* v. *Richmond News*, 9 N. Y. 2d 578, 216 N. Y. S. 2d 369 (1961), which so confined the statute then in effect. The Federal Constitution nowhere commands any such state judicial supremacy. The States are free, of course, by whatever organs they choose, to give wider freedom for expression than the First and Fourteenth Amendments require. See *Mishkin* v. *New York*, 383 U. S. 502, 507-508 (1966); Paulsen, *State Constitutions, State Courts, and First Amendment Freedoms*, 4 Vand. L. Rev. 620, 642 (1951); cf. *Johnson* v. *New Jersey*, 384 U. S. 719, 733 (1966). They are not perpetually bound by experiments in that direction.

(3) The attack upon §235 as void for vagueness is frivolous. *Roth* v. *United States* sustained the bare word "obscene" against a similar assault. See 354 U. S. at 491-92. New York's detailed definition renders its statute more clearly impregnable.

III.

The argument that there must be an adversary hearing before an arrest for obscenity is made in two forms: (1) as an attack on N. Y. Code Crim. Proc. §§148-150, an asserted subject for three judges, and (2) as a simple claim of official lawlessness, cognizable by one judge. Version No. (1) invites us to an area that "abounds with slippery distinctions," Wright, *Federal Courts* 164 (1963) — namely, "between a petition for an injunction on the ground of the unconstitutionality of the statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a stat-

ute which is not attacked as unconstitutional. The latter petition does not require a three-judge court." *Ex parte Bransford*, 310 U. S. 354, 361 (1940). In the view we have taken, since there is three-judge jurisdiction on other grounds (see note 10, *supra*), we need not wade into this morass. See *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73, 80-81, 84 (1960), and cases there cited. Accordingly, we can and do go directly to the asserted requirement of a preliminary adversary hearing and decide the essentially identical question under either formulation—whether such a novelty is mandated by the First Amendment.

While what plaintiffs propose is indeed a relative "novelty," their argument is not without arguable connection to established principles. Plaintiffs rely upon the decisions which have condemned mass, or broadly effective, seizures of allegedly obscene writings without a prior adversary hearing. *A Quantity of Books* v. *Kansas*, 378 U. S. 205 (1964); *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961); *Bethview Amusement Corp.* v. *Cahn*, — F. 2d — (2d Cir. 1969); *Tyrone, Inc.* v. *Wilkinson*, 410 F. 2d 639 (4th Cir. 1969); *Metzger* v. *Pearce*, 393 F. 2d 202 (7th Cir. 1968). A "prior restraint" is also effected, plaintiffs say, when arrests are made—particularly multiple arrests for promoting the same publication—because this inhibits others from continuing to distribute the materials. And so, the argument concludes, there must be an adversary hearing and judicial determination preceding the inception of the criminal process.

The argument is not merely plausible; it has won approval in several courts. *Delta Book Distributors* v. *Cronwick, Inc.*, — F. Supp. — (E. D. La. 1969) (three-judge court); *Cambist Films, Inc.* v. *State of Illinois*, 292

Appendix A

F. Supp. 185 (N. D. Ill. 1968); *Sokolic* v. *Ryan*, Civ. No. 2501 (S. D. Ga., 9/18/69).[11] But decisions we believe to be sounder, at least in the present state of learning, go the other way: *Turoff, Inc.* v. *Wilkinson*, 410 F. 2d 639 (4th Cir. 1969); *Rage Books Inc.* v. *Leary*, 301 F. Supp. 546 (S. D. N. Y. 1969), appeal pending; *Astro Cinema Corp., Inc.* v. *Mackell*, 69 Civ. 778 (E. D. N. Y., 8/19/69); *The East Village Other, Inc.* v. *Koota*, 68 Civ. 125 (E. D. N. Y., 2/13/68). In the respect here pertinent, we join the latter group.

It is of interest in this connection, if by no means decisive, that plaintiffs' theory, if accepted, would have invalidated both federal and state convictions under obscenity statutes which have in the recent past been upheld by the Supreme Court. *Ginsberg* v. *New York*, 390 U. S. 629 (1968); *Mishkin* v. *New York*, 383 U. S. 502 (1966); *Ginzburg* v. *United States*, 383 U. S. 463 (1966). A point of greater importance, both as a matter of legal history and practical judgment, is the fact that the prior adversary proceeding plaintiffs demand would not serve to eliminate either the "chill" or the "prior restraint" against which they contend. It does not appear that there were any arrests in the present cases before a judicial officer had scrutinized the materials and determined that warrants should issue. All that, like the proceedings of a grand jury, was accomplished *ex parte*—without either

[11] Each of the cited cases is distinguishable from ours in that each involved arrests coupled with seizures of allegedly obscene material. No seizures occurred in the cases before us. Nevertheless, as is highlighted by Judge Rubin's partial dissent addressed to this aspect of the *Delta Book Distributors* case, the court in each instance was persuaded to enjoin further criminal proceedings in addition to granting separable relief from the unlawful seizures.

the possible benefit to the accused or the potentially "chilling" effect upon others of adversary proceedings. The result, at least in terms of history, is to avoid any traditional form of "prior restraint" because the first overt impact upon the allegedly protected area comes at a time when all the protections and favorable presumptions of the criminal process are available to the defendant. Cf. *Near v. Minnesota*, 283 U. S. 697, 713-14 (1931).

This is not to blink at the undeniable fact that arrests and prosecutions are likely to deter activities of the kind against which they are directed. The very existence of criminal sanctions for forms of expression, especially when the standards of liability are such vexed questions at the highest judicial levels, must have some appreciable tendency of the same type. See *Smith v. California*, 361 U. S. 147, 154-55 (1959). The point remains that the inhibitions are not avoided by the new procedure plaintiffs want; they are, if anything, pushed back to an earlier time of open contest—when the burden of litigation and a species of readier "defeat" are likely to work their deterrent effects.

It is inappropriate, we think, to "weigh" (assuming we could) the relative impact of familiar criminal procedures against the innovation plaintiffs seek. It seems sufficient for our purposes that the supposed virtues of the dispositive they urge are not at all apparent and are directly antithetical to all pertinent indications in the Supreme Court's pronouncements implementing the First Amendment. The net effect of those expressions suggests that traditional criminal prosecutions, with their procedural safeguards, are surely permissible and very possibly preferred vehicles for enforcing laws against obscenity. See *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 489-90 (1962) (opinion of Harlan, J.); *id.* at 492-93 (Brennan, J., concurring); *Freedman v. Maryland*, 380 U. S. 51, 58 (1965); *id.* at 72-73 (Douglas, J., concurring); *Interstate Circuit, Inc. v. Dallas*, 390 U. S. 676, 690 (1968); *id.* at 709-10 (Harlan, J., concurring in part and dissenting in part); *Ginzburg v. United States*, 383 U. S. 463, 474-75 (1966); *Roth v. United States*, 354 U. S. 476, 492 (1957).

APPENDIX B

New York Penal Law Section 235.00(1):

"1. 'Obscene'. Any material or performance is 'obscene' if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience."

Code of Criminal Procedure, Sections 148, 149, 150:

"CHAPTER II.—THE WARRANT OF ARREST

"§ 148. EXAMINATION OF THE PROSECUTOR AND HIS WITNESSES, UPON THE INFORMATION

When an information is laid before a magistrate, of the commission of an offense, he must examine on oath the informant or prosecutor, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them.

As amended L. 1967, c. 681, § 31, eff. Sept. 1, 1967."

"§ 149. DEPOSITIONS, WHAT TO CONTAIN

The depositions must set forth the facts stated by the prosecutor and his witnesses, tending to establish the commission of the offense and the guilt of the defendant.

As amended L. 1967, c. 681, § 32, eff. Sept. 1, 1967."

"§ 150. IN WHAT CASE A SUMMONS OR WARRANT OF ARREST MAY BE ISSUED

1. If the magistrate be satisfied, from such depositions, that the offense complained of has been committed, and the offense charged is one of which a court of special sessions has exclusive jurisdiction and the person charged with the commission of the offense is a citizen of the state and a resident of the city or town where the information is laid, the magistrate may, in his discretion, instead of issuing a warrant as hereinafter provided, issue a summons which shall be substantially in the following term: '..... court, county of ..... city or town of .....

In the name of the people of the state of New York:
To .....

Complaint having been made this day by ..... that you (here briefly state the nature of offense in regard to which complaint is made), you are hereby summoned to appear before me (here insert title of magistrate issuing summons), at (location of court) on the ..... day of ..... 19 ..... at ..... o'clock .....M., to the end that an investigation may be made of said complaint; and upon your failure to appear at the time and place herein mentioned, you are liable to a fine of not exceeding twenty-five dollars. Dated at ..... the ..... day of .....

.....
(Here insert official title of magistrate).'

Appendix B

Upon said summons shall be indorsed the name of the complainant and of the person summoned and also a brief description of the offense complained of.

A record shall be kept of the issuance and disposition of each summons in the same manner as in proceedings under which a warrant is issued.

Such summons may be served by the complainant, or by a peace officer, or by any other person designated by the magistrate.

Upon the return of the summons the magistrate shall inquire and investigate into the subject-matter of the complaint in the same manner as if defendant were brought before the magistrate upon a warrant of arrest.

If the person summoned does not appear, such failure to appear shall constitute a contempt, which the magistrate is empowered to punish by a fine of not exceeding twenty-five dollars.

. Upon the return of the summons the magistrate shall inquire and investigate into the subject-matter of the complaint in the same manner as if defendant were brought before the magistrate upon a warrant of arrest. (sic)

If the person summoned does not appear, such failure to appear shall constitute a contempt, which the magistrate is empowered to punish by a fine of not exceeding twenty-five dollars. (sic)

2. If the magistrate be satisfied from such depositions that the offense complained of has been committed, and that there is reasonable ground to be-

lieve that the defendant has committed it, and if the case is one that does not come within the provisions of subdivision one of this section, he must issue a warrant of arrest. If a summons shall have been issued as heretofore provided, and the person summoned shall have failed to appear or shall have appeared and the magistrate determines that there is a reasonable ground therefor, a warrant of arrest may be issued.

As amended L. 1967, c. 681, § 33, eff. Sept. 1, 1967."

APPENDIX C

List of Arrests Affecting the Publication Screw

Affidavit of Lt. Ralph Russo, dated September 29, 1969 (R. #22), states that the District Attorney's Office search of the records revealed that "thirteen (13) newsstand operators were arrested and charged with selling issues of the tabloid Screw."

The complaint also alleges that the publishers, printers and distributors were arrested for promoting the newspaper Screw.

In addition to the arrests of thirteen newsstand operators, appellants set forth below the following cases lodged against publishers, printers and distributors of the publication Screw:

Case	*Docket Number*
People v. Jim Buckley	B13186/1969
People v. Al Goldstein	B13187/1969
People v. Joseph Maffia	B13188/1969
People v. Martin Balan	B13189/1969
People v. Jim Buckley	B16494/1969
People v. Al Goldstein	B16495/1969
People v. Archie Gordon	B16496/1969
People v. Jim Buckley	B20637/1969
People v. Al Goldstein	B20638/1969
People v. Jim Buckley	B21343/1969
People v. Al Goldstein	B21344/1969

Furthermore, Lt. Russo's number of arrests of newsstand operators covered only New York County. In addition to New York County, there were arrests for selling issues of the publication Screw in Kings County and Queens County, as follows:

Case	*Docket Number*
People v. Andrew Bartosh	B15086/1969 (Kings Co.)
People v. Sol Lieber	A4360 /1969 (Queens Co.)
People v. Sam Newman	A4361 /1969 (Queens Co.)
People v. Howard Ladinsky	A4362 /1969 (Queens Co.)

Total arrests for affected issues of "Screw" including newsstand operators and publishers, printers and distributors, twenty-eight (28).